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In the Supreme Court of the United States

OCTOBER TERM, 1985

YOSH SÁKAMOTO, ET AL., PETITIONERS

v.

DUTY FREE SHOPPERS, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD J. LAZARUS
Assistant to the Solicitor General

GARY LAWSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Territorial Government of Guam and its instrumentalities are subject to the negative implications of the Commerce Clause.

2. Whether the Territorial Government of Guam and its instrumentalities are subject to federal antitrust laws.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to state the views of the United States concerning this case.

STATEMENT

1. Petitioners Yosh Sakamoto, Pacific Gift Supply, and Top Enterprises, Inc. (Petitioners) and respondent Duty Free Shoppers, Ltd. (Duty Free) sell gift merchandise in Guam, primarily to Japanese tourists (Pet. 3; Pet. App. 22-23). In 1967, respondent Government of Guam granted an exclusive merchandising concession at the Guam International Airport Terminal (the Terminal) to Jones & Guerrero Co., which in [illegible] assigned the Terminal concession to Duty Free in 1972 (Pet. App. 3). In 1978, respondent

Guam Airport Authority (the Authority), an autonomous instrumentality of the Guam government that has operated the Terminal since 1975, publicly solicited bids on the Terminal's exclusive concession (Pet. App. 3-4). Respondent Duty Free was the high bidder, offering more than $140,000,000 for a fifteen-year concession and five-year option (Pet. App. 4, 23). The Authority has used revenues from the concession agreement to fund a substantial portion of the construction costs of a new airport terminal that was completed on January 20, 1982 (*ibid.*).

Under the exclusive concession agreement, only respondent Duty Free may sell or deliver merchandise to customers at the Terminal (Pet. App. 1, 23). The restriction on deliveries applies regardless of the location of the original sale (Pet. App. 4-5, 23). Petitioners claim that the delivery restriction harms their business because Guam has become a resort area for Japanese tourists, who request that their gift purchases be delivered to them at the Terminal on their day of departure (Pet. 3).

2. Petitioners filed a complaint in the United States District Court for the District of Guam alleging that the delivery restriction in the Authority's exclusive concession agreement with Duty Free violates, inter alia, the Commerce Clause and the Sherman Act (Pet. App. 1-2). Petitioners subsequently filed a motion for partial summary judgment on several of its claims, including the Commerce Clause and Sherman Act causes of action (Pet. App. 2), and respondents filed a cross-motion for summary judgment (*ibid.*).

3. The district court granted respondents' motion for summary judgment, dismissing petitioners' complaint (Pet. App. 1-21). The court held (Pet. App. 18-19) that the negative implications of the Commerce Clause do not apply to Guam. On the Sherman Act issue, the court ruled (Pet. App. 6-11) that the government of Guam and the Authority

are federal agencies or instrumentalities not subject to federal antitrust laws and that Duty Free is immune from antitrust scrutiny under this Court's decisions in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965).[1]

4. The court of appeals affirmed, holding that neither the Commerce Clause nor federal antitrust laws restrict respondents' activities pursuant to the exclusive concession agreement (Pet. App. 22-28; 764 F.2d 1285). Judge Hug, concurring, expressed the view that the Commerce Clause does apply, but that the agreement does not "burden * * * interstate commerce" (Pet. App. 29).

DISCUSSION

The court of appeals correctly ruled that the federal antitrust laws do not apply to the government of Guam in this case, but erroneously concluded that the negative implications of the Commerce Clause do not apply. Because, however, there is little to suggest that the exclusive concession agreement constitutes an undue burden on interstate or foreign commerce, the petitioners' Commerce Clause claim, too, is insubstantial and does not warrant this Court's review. Accordingly, the Court should deny the petition for a writ of certiorari.

1. The special status of Guam is central to a determination of the applicability of either the dormant Commerce Clause or federal antitrust laws to activities of the government of Guam. The unique features of Guam, and of its government, are not conducive to simple application of the

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[1]The district court also held that petitioners' antitrust claims fail for lack of standing, are barred by laches and the applicable statute of limitations, and are subject to the valid defense that the concession agreement is reasonable (Pet. App. 11-18).

concerns and legal categories typically determinative of Commerce Clause or antitrust law claims.

Guam is an unincorporated territory and, accordingly, falls within Congress's "general and plenary" authority under the Territories Clause, U.S. Const. Art. IV, § 3, Cl.2.[2] See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1, 42 (1890); see also *Downes* v. *Bidwell*, 182 U.S. 244, 306-339 (1901) (White, J., concurring) (setting forth the distinction between incorporated and unincorporated territories). Pursuant to that Clause, Congress has granted Guam significant powers of self-government (see generally Organic Act of Guam, 48 U.S.C. (& Supp. I) 1421-1424), while reserving the power inherent in the Territories Clause to annul territorial legislation (48 U.S.C. 1423i).[3] Accordingly, the government of Guam is, in certain respects, akin to a federal instrumentality or " 'agency of the federal government' " (see *United States* v. *Wheeler*, 435 U.S. 313, 321 (1978), quoting *Domenech* v. *National City Bank*, 294 U.S. 199, 204-205 (1935)). Yet, the government of Guam sharply differs in composition and function from most federal agencies and instrumentalities; by congressional design, the government of Guam, while theoretically subject to plenary congressional oversight, resembles an autonomous sovereign, with both elected officials (see 48 U.S.C. 1422; 48 U.S.C. (& Supp. I) 1423) and the general structure and responsibilities of the fifty States.[4]

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[2]The Territories Clause confers upon Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." U.S. Const. Art. IV, § 3, Cl. 2.

[3]We know of no instance in which this congressional power of annulment has been exercised in the case of Guam.

[4]For this reason, the Department of the Interior has expressed the view that Guam should not, in certain contexts, be treated like a federal

2. a. Examination of the Commerce Clause issue must start with the well-settled proposition that not all provisions of the Constitution apply of their own force to unincorporated territories, and that Congress may determine whether the application of particular provisions would be appropriate in each such territory. *Torres* v. *Puerto Rico*, 442 U.S. 465, 469-470 (1979). The Organic legislation establishing the government of Guam nowhere provides for full application of the Constitution. Indeed, the legislative history surrounding passage of the Organic Act for Guam reveals deliberate legislative intent not to apply the Constitution generally to Guam.[5]

The task of deciding whether a particular constitutional provision applies in an unincorporated territory such as Guam has been largely left to the courts, with "a [congressional] determination that [the] constitutional provision practically and beneficially may be implemented in [the] territory entitled to great weight" (442 U.S. at 470).[6] In a case, such as this one, where no fundamental individual right or structural principle is at stake[7] and no

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instrumentality. See, *e.g.*, *Procurement of the Government of Guam-Applicability of the Buy American Act and Federal Procurement Regulations System*, 74 Interior Dec. 365 (1967) (statute and regulations inapplicable to Guam). See also S. Rep. 99-141, 99th Cong., 1st Sess. 50 (1985) (emphasis omitted) (report on Department of the Interior appropriations bill for 1986) ("* * * Guam * * * [is not an] agenc[y] or instrumentalit[y] of the Federal Government").

[5]Proponents of the bill emphasized that it did not extend full constitutional protection to Guam, in contrast to congressional treatment of incorporated territories such as Alaska and Hawaii (96 Cong. Rec. 7562-7563 (1950) (statement of Cong. Peterson)).

[6]Congress did provide in Guam's organic legislation a bill of rights modeled after our own (48 U.S.C. 1421b). In addition, Congress has more recently authorized adoption of a Constitution for Guam. See Pub. L. No. 94-584, 90 Stat. 2899 *et seq.*

[7]*Balzac* v. *Porto Rico*, 258 U.S. 298, 312-313 (1922) ("the guaranties of certain fundamental personal rights declared in the Constitution

congressional determination that the Constitution should generally apply is evident,[8] a constitutional limitation should not apply absent some showing of affirmative legislative intent favoring its application. The need for congressional intent is especially compelling in the instant context because any potential burdens on interstate or foreign commerce created by the government of Guam are, at least in theory, redressable through congressional plenary authority over Guam. To that extent, we agree with respondents that the "dormant Commerce Clause therefore should apply to a territorial government only if Congress applies it" (Resp. (Authority) Br. in Opp. 11).

b. We agree with respondents, moreover, that no such showing of affirmative congressional intent is supplied in the provision of the Organic Act subjecting the legislative power of the government of Guam to "the laws of the United States applicable to Guam" (48 U.S.C. 1423a). This provision does not in any way say which United States laws do apply. And, even if this provision were interpreted to refer to constitutional provisions as well as statutory laws of the United States,[9] it obviously was not intended to suggest

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* * * had from the beginning full application * * *"); see also *Northern Mariana Islands* v. *Atalig*, 723 F.2d 682, 688 (9th Cir. 1984), cert. denied, No. 83-6424 (June 11, 1984). Even if the Constitution's structural provisions, governing the relationships between the national and state governments, are "always and everywhere applicable" (*Balzac* v. *Porto Rico*, 258 U.S. at 312), the negative Commerce Clause is nonetheless not "fundamental" in this sense because territories are not states and therefore do not implicate federalism concerns.

[8]See *Mullaney* v. *Anderson*, 342 U.S. 415, 419-420 (1952) (extending Privileges and Immunities Clause (Art. IV, § 2, Cl. 1) to Alaskan territory); see also *Duncan* v. *Kahanamoku*, 327 U.S. 304, 317 (1946) ("Congress did not intend the Constitution to have a limited application to Hawaii").

[9]But see Act of Aug. 1, 1950, ch. 512, § 25(b), 64 Stat. 391 (provision of original Organic Act, since repealed, directing the President to determine which "law[s] of the United States" shall be "applicable to

general application of the Constitution, in light of Congress's express intent not to apply the Constitution generally (see note 5, *supra*).

c. We find evidence of congressional intent to apply the negative implications of the Commerce Clause to the government of Guam, however, in statutory language not yet focused on by the parties or considered by the courts below. Congress conferred upon the Guam legislature the power of a legislature, but only to the extent of "subjects of legislation of *local application*" (48 U.S.C. 1423a (emphasis added)), most likely picking up on language Congress had used previously in organic legislation concerning the Virgin Islands. See Act of June 22, 1936, ch. 699, § 19, 49 Stat. 1811. On the floor of the House, a principal supporter of the legislation echoed the "local" theme, referring to the broad legislative powers Guam would have within the "local legislative sphere" (96 Cong. Rec. 7563 (1950) (letter of Congressman Crawford)). This, perhaps seemingly innocuous, modifier bore special significance in the Commerce Clause context during the general time period that Congress drafted the legislation for the Virgin Islands and for Guam. In particular, the term "local" was a term of art, then, that suggested the limits of a state's legislative powers under the negative implications of the Commerce Clause. See generally *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981); see also *Freeman* v. *Hewit*, 329 U.S. 249, 252-254 (1946). Accordingly, congressional usage of the "local" modifier in this context can be taken to indicate an intent to subject the Guam legislative powers, like those of a state, to the bounds supplied by the dormant Commerce Clause.

Guam" and seeming to equate "law[s]" with "statutes"); see also 48 U.S.C. 1423d, 1424(a) (treating "laws of the United States" and "Constitution" as distinct categories); U.S. Const. Art. III, § 2, Art. VI, Cl. 2 (same).

Doubt about the import of this isolated modifier is greatly reduced, moreover, by subsequent congressional action that both corroborates the significance of the term "local" and reveals a congressional assumption that the dormant Commerce Clause applied to the government of Guam. The 1950 Organic legislation directed the President to appoint a Commission to determine which laws of the United States should apply to Guam. § 25(b), 64 Stat. 391. One specific recommendation of the Commission, discussed favorably and adopted by both houses of Congress, was to extend to Guam congressional protection from the dormant Commerce Clause recently provided (in the McCarran-Ferguson Act, 15 U.S.C. (& Supp. II) 1011 *et seq.*) to state regulation of the business of insurance.[10] Congress considered such protection for Guam necessary in the aftermath of a decision of this Court,[11] which, Congress concluded, threatened the accepted notion that "the business of regulating insurance [was] a proper subject of *local law*." S. Rep. 2662, 84th Cong., 2d Sess. 4 (1956) (emphasis added) (report on bill extending federal laws to Guam); H.R. Rep. 2259, 84th Cong., 2d Sess. 6 (1956) (same); House Comm. on Interior and Insular Affairs, *Report of the Commission on the Application of Federal Laws to Guam,* H.R. Doc. 212, 82d Cong., 1st Sess. 5 (1951); see also Staff of House Comm. on Interior and Insular Affairs, 82d Cong., 2d Sess., *Resource Material Used in the Preparation of the Report of the Commission on Application of Federal Laws to Guam* 97-98 (Comm. Print 1952). Passage of the proposal extending the reach of the McCarran-Ferguson Act to Guam (Act of Aug. 1, 1956, ch. 852, § 4, 70 Stat. 908), therefore,

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[10]See *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 653-655 (1981). See also *Metropolitan Life Ins. Co.* v. *Ward*, No. 83-1274 (Mar. 26, 1985), slip. op. 10-12.

[11]*United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

confirms that Congress assumed that the negative implications of the Commerce Clause otherwise confined the "local" legislative powers of Guam.

d. Normally, a threshold determination that the Commerce Clause applies to a challenged legislative measure would suggest a need for further detailed inquiry into the degree of burden created and the legislative purposes served. *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 10. Further consideration of petitioners' Commerce Clause claim, however, is not warranted.

The gravamen of petitioners' complaint is that the government of Guam is favoring certain domestic business enterprises over other domestic enterprises. Their concerns are not directed to discriminatory practices that favor in-state interests to the detriment of out-of-state interests — the central concern of the Commerce Clause. See, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, No. 82-1565 (June 29, 1984), slip op. 4 (citations omitted) ("A cardinal rule of Commerce Clause jurisprudence is that * * * [a] State [may not] * * * provid[e] a direct commercial advantage to local business."). Nor does this case trigger the Commerce Clause concern with "[u]nrepresented interests * * * bear[ing] the brunt of regulations imposed by one State" (*South-Central Timber Development, Inc.* v. *Wunnicke*, slip op. 9); petitioners are businesses operating within Guam and, consequently, are provided with "a powerful safeguard against legislative abuse" (*Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981)).

Indeed, the gist of petitioners' complaint is that the government of Guam has placed petitioners at a competitive disadvantage in order to raise revenues to construct an

airport.[12] Interstate and foreign commerce may be incidentally affected by the arrangement, but we believe petitioners must find their relief, if any, in antitrust laws and not attempt to use "the Commerce Clause [to] inject[] principles of antitrust law * * *" (cf. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. at 619 n.8).[13] The merits of petitioners' suit, therefore, depends on their antitrust claim, to which we now turn.

3. We agree with respondents, and the court of appeals below, that the government of Guam and its instrumentalities are immune from suit under federal antitrust laws.[14] The proposition is widely accepted that federal instrumentalities are immune from federal antitrust attack. See, *e.g.*, *Jet Courier Services, Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221, 1228 (6th Cir. 1983); *Feldman* v. *Gardner*, 661 F.2d 1295, 1307-1308 (D.C.Cir. 1981), cert. denied, 458 U.S. 1106 (1982), vacated on other grounds, 460 U.S. 462 (1983); *Sea-Land Service, Inc.* v. *Alaska R.R.*, 659 F.2d 243, 246 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982); *Webster County Coal Corp.* v. *TVA*, 476 F. Supp. 529, 532 (W.D. Ky. 1979); see also *United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941) (dictum). And the government of Guam, as noted at the outset (page 4, *supra*), is in certain

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[12]Hence, the rationale of this Court's decisions immunizing activities of a state as a "market participant" from Commerce Clause challenge further undercuts petitioners' claim. See, *e.g.*, *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

[13]Indeed, petitioners' constitutional complaint is more suggestive of a substantive due process or equal protection claim, but those constitutional provisions have not been invoked.

[14]There is, of course, no question that the antitrust laws apply generally to Guam (*United States* v. *Standard Oil Co.*, 404 U.S. 558 (1972) (per curiam) (Sherman Act applies to American Samoa); *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937) (Puerto Rico), the only issue here is their applicability to the government of Guam.

contexts best viewed as a federal instrumentality. The question whether a particular federal instrumentality is acting in a manner that thwarts congressional intent—including whatever intention Congress might have regarding the need to promote a fully competitive free market—is best resolved by reference to the relevant organic statutes and the policies they reflect, not through a suit brought under the antitrust laws. See *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 78-79 (1944).

To be sure, the government of Guam is an entity quite distinct from classic federal instrumentalities such as a Federal Reserve bank or the TVA and cannot for all purposes be viewed as a mere "creation of Congress" (*United States* v. *Wheeler*, 435 U.S. at 321). For the purposes of petitioners' antitrust claim, however, the special attributes of the government of Guam merely suggest an analogy to state action, rather than to private conduct to which antitrust restraints primarily apply. Congress surely intended the government of Guam, like the government of Puerto Rico, to possess "an autonomy similar to that of the states * * *" in the antitrust context. *Puerto Rico* v. *Shell Co.*, 302 U.S. at 262. The activities of Guam, challenged by petitioners, are not unlike the anti-competitive activities undertaken by states acting as sovereigns and certainly do not fall outside congressional contemplation.[15] Although the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341, 350-352 (1943),

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[15]Indeed, Congress expressly conferred on the Guam legislature the power to impose "royalties for franchises, privileges, and concessions * * *" (48 U.S.C. 1423a). The Guam airport has received federal financial assistance and, consequently, the exclusive concession agreement may be subject to certain statutory requirements and relevant Department of Transportation regulations. See, *e.g.*, Airport and Airway Improvement Act of 1982, 49 U.S.C. App. 2210(a)(1); 49 C.F.R. 23.43(d)(1). No issue has been raised in this case, however, concerning the consistency of the concession agreement with these regulations, should they be applicable.

is not directly applicable to Guam, the rationale of that doctrine does support the appropriateness of affording Guam immunity akin to that of a federal instrumentality in the antitrust context.[16]

4. In sum, the court of appeals erroneously held that the dormant Commerce Clause does not apply to Guam, but petitioners' Commerce Clause claim is too insubstantial on the merits to warrant this Court's review. The court of appeals correctly ruled that the federal antitrust laws do not apply to the activities of the government of Guam challenged in this case.[17]

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[16]Petitioners misapprehend (Pet. 11-12) the import of this Court's suggestion in *United States* v. *Wheeler*, 435 U.S. at 321 n.16, that the relationship between a territory and the federal government could be compared to that between a city and a state. Limitations on the application of state antitrust immunity to municipalities (*e.g.*, *Town of Hallie* v. *City of Eau Claire*, No. 82-1832 (Mar. 27, 1985), slip op. 3-5) do not readily transfer to federal instrumentalities; different considerations are relevant in the federal context, especially, where, as here, Congress clearly intended the government of Guam to act much like an autonomous sovereign.

[17]Because the petition for a writ of certiorari presents no question concerning the antitrust liability of a private party such as respondent Duty Free, we do not discuss that subject.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD J. LAZARUS
Assistant to the Solicitor General

GARY LAWSON
Attorney

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